United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7612

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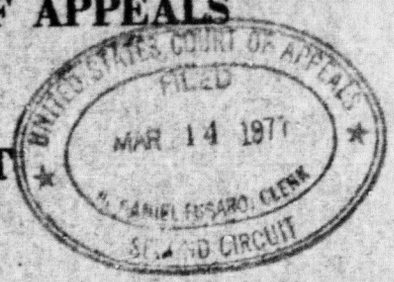
UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



LOCAFRANCE U S CORPORATION,

Plaintiff-Appellant,

-against-

INTERMODAL SYSTEMS LEASING, INC., DANIEL H. OVERMYER, SHIRLEY OVERMYER, JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER, BARBARA STRAND AND "JOHN DOE," THAT NAME BEING FICTITIOUS, THE TRUE NAME OF THE DEFENDANT BEING UNKNOWN TO PLAINTIFF AND THE PERSON INTENDED BEING TRUSTEE f/t/b OF DEFENDANTS JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER and BARBARA STRANG,

Defendants-Appellees.

On Appeal from a Judgment Entered in the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANTS-APPELLEES

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3. Is LOCAFRANCE barred from questioning the effectiveness of the release?

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5. Was the District Court correct in dismissing the complaint as to all defendants?

6. Is the validity of the settlement and release unaffected by §29 of the Securities and Exchange Act?

7. Was the District Court correct in its construction of the release?

8. Do LOCAFRANCE'S own contentions regarding an alleged liquidated damages agreement prove that the complaint fails to state a cause of action?

9. Even if the release did not mandate dismissal of this action, should it have been dismissed upon the other grounds raised in defendants' motion?

STATEMENT OF THE CASE

Since the plaintiff has raised an issue regarding the proceedings in the court below, defendants wish to present a more complete Statement of the Case than has been provided by plaintiff.

Plaintiff-Appellant, LOCAFRANCE U.S. CORPORATION ("LOCAFRANCE") brought the present action against INTERMODAL SYSTEMS LEASING, INC. ("ISLI"), DANIEL H. OVERMYER, SHIRLEY OVERMYER, JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER, BARBARA STRANG, and JOHN DOE, a fictitious name intended to represent the TRUSTEE for the benefit of defendant JOHN OVERMYER, ELIZABETH OVERMYER, EDWARD OVERMYER, and BARBARA STRANG. The complaint alleges securities fraud under §§12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§77 L and 77 g) and under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78;) and Rule 10b-5 promulgated thereunder (19 C.F.R. §240 106-5); Martin Act Violations (§352c of the New York General Business Law); common law fraud; and common law negligence. Plaintiff seeks rescission of the alleged securities transactions or damages in the amount of $732,104.00.

Defendants moved to dismiss the complaint on the grounds of accord and satisfaction, release, statute of limitations, lack of the requisite use of a means or instrumentality of interstate commerce, impermissible use of a "John Doe" complaint, insufficiency of service of process, failure to comply with FRCP 9(b), laches, lack of pendent jurisdiction, and failure to state a cause of action

against defendants JOHN OVERMYER, ELIZABETH OVERMYER AND EDWARD OVERMYER. Defendants also requested security for costs and other related relief.

Defendants submitted the detailed affidavit of DAVID RAIBLE, President of defendant ISLI, which explains the factual background of the litigation (A21) and contains documentary evidence to establish the facts. Affidavits of DANIEL H. OVERMYER (A108) and of HALLI PANKIN (A118) were also submitted.

In response, plaintiff presented an affidavit of PAUL W. SEIGE (A151).

Defendants replied by submitting the affidavit of IRWIN M. ECHTMAN (A208) who had personal knowledge of the settlement negotiations, plus additional documentary evidence (A216-A306).

Subsequently, without leave of court, plaintiff submitted an unauthorized surreply (A328). No objection to the surreply was made by the defendants.

The affidavit of JAN D. ATLAS (A205) was actually part of plaintiff's surreply, and therefore should more properly appear at (A328). As the Appendix now reads, Mr. Atlas surreplies to the affidavit of Mr. Echtman before the affidavit of Mr. Echtman appears.

The motion was argued orally on November 4, 1976. Immediately before argument, Judge Brieant was engaged in sentencing several defendants. A court reporter was present. When those matters were concluded, Judge Brieant asked the attorneys for LOCAFRANCE and

for defendants whether they would agree to waive a transcript of the argument. Both parties stipulated that this should be done, and accordingly, a transcript of the proceedings on November 4, 1976, was not made.

Counsel for plaintiff LOCAFRANCE was then given a full and fair opportunity to present his side of the controversy, which he did. No one interfered with his presentation, and no attempt was made by anyone to prevent him from making all the contentions that he had to make.

After counsel for the plaintiff concluded his argument, the defendants' attorney was given a chance to present his side of the case, which he did. Judge Brieant stated that arguments with regard to service of process were useless because the defendants could be served again and any defects could be cured. Moreover, Judge Brieant reproached the attorney for failing to inform himself as to the identity of the "John Doe" trustee and to disclose the identify to the Court. Attorney for defendants promised that he would obtain the information as soon as possible.

Judge Brieant suggested, and the parties, having no further arguments, agreed that the proceedings be adjourned until November 9, 1976, at which time the disclosure of the trustee would be made.

On November 9, 1976, a court reporter was present. The transcript of the proceedings appears at A343 et seq. of the Appendix. The transcript corroborrates that the parties were previously in court "in connection with this motion on November 5. . ." (A344).

After the identify of the trustee was disclosed, Judge Brieant informed the parties that he had analyzed the voluminous motion papers and affidavits and had decided to find for the defendants.

The transcript shows that the plaintiff's allegation that he was denied oral argument is false. Judge Brieant explicitly refers to the oral argument of November 5.

> BY THE COURT:
>
> I think I previously indicated to you informally on November 5 that I would not require the security for costs. . .
>
> (A348)

After the decision for defendants was read into the record, the attorney for plaintiff rather heatedly insisted upon reiterating his arguments for no apparent purpose. The reply of Judge Brieant indicates that he would not entertain an informal, oral motion for reargument.

> BY THE COURT:
>
> I have rendered my decision. I have read all these papers. I don't want to hear anything more.
>
> (353A Emphasis added)

However, the Court did permit Mr. Atlas to continue his argument, and Mr. Atlas did continue to reargue his case at some length (A353-A355).

On appeal, attorney for plaintiff attempts to elicit sympathy by quoting those passages of the transcript wherein he is told to refrain from further argument. Actually, plaintiff's attorney artfully omitted from his brief those portions of the record which show

that he was permitted to and did continue his reargument. See A353-A355

On appeal, plaintiff shows the same disrespect for the court that he exhibited in the court below. It is no accident that the affidavits submitted by the defendants have been printed in small print (A21,A118), whereas the affidavit submitted by plaintiff (A151) is in large print. It is no accident that the complaint of ISLI in the Illinois action (A216) is in small print, whereas the complaint of plaintiff LOCAFRANCE (A5) is in large print. It is no accident that the defendants are called by their first names throughout the plaintiff's brief (p.2 et seq.), a mode of address which, if it were used in court, would be grounds for a mistrial. Defendants are confident that the court will see through these shabby attempts to hold them up to ridicule and belittle their statements.

STATEMENT OF FACTS

Defendant ISLI is a Delaware Corporation with principal place of business in New York engaged in renting forklift trucks and other equipment necessary to the maintenance of warehouses (A21). Plaintiff LOCAFRANCE is a corporation engaged in equipment leasing and capital financing, and is a subsidiary of a foreign corporation based in France. (A213 bottom of page; A157). Defendant DANIEL H. OVERMYER is a former officer of ISLI. Defendant SHIRLEY OVERMYER is his wife. Defendants JOHN OVERMYER and EDWARD OVERMYER are their infant children, and defendants ELIZABETH OVERMYER and BARBARA STRANG are their daughters. (A108).

In 1972 and 1973, ISLI and LOCAFRANCE entered into three sale-leaseback contracts whereby LOCAFRANCE purchased approximately 276 forklift trucks from ISLI. LOCAFRANCE leased the trucks to ISLI, and ISLI obtained the right to purchase the trucks for a nominal sum at the end of the lease period (A21). Thus, ISLI retained possession and control of the trucks and received capital, while LOCAFRANCE received the right to rental payments and received tax advantages from depreciation on the trucks. The sole parties to this transaction were LOCAFRANCE and ISLI (A22).

Subsequently, a dispute developed between the parties. LOCAFRANCE alleges (A153) that sometime in December, 1973, ISLI defaulted on the sale leaseback contract. ISLI alleges (A22 et seq.; cf. A216 et seq.) that in November, 1973, various large warehouse companies were placed in Chapter XI reorganization proceedings. As a result, ISLI needed to develop new business relations as uses of the warehouses were changed and as new corporations were created. To help assure a continued high return on its capital during this transitional period, LOCAFRANCE offered to send employees throughout the United States to execute leases on behalf of ISLI with its customers. In this way, LOCAFRANCE persuaded ISLI to entrust it with confidential information, including a customer's list and inventory records.

Thereafter, LOCAFRANCE wrongfully used the confidential information given to it to locate, seize and convert various forklift trucks and to take business away from ISLI. In addition, LOCAFRANCE hired a former employee of ISLI wrongfully to solicit ISLI's

customers; LOCAFRANCE made false representations to many of ISLI's customers; and LOCAFRANCE threatened the customers so that they would cease transacting business with ISLI (A106;A216). LOCAFRANCE further wrongfully sold the forklift trucks to one ATLAS FORKLIFT TRUCK RENTAL AND SALES, INC. ("ATLAS").

On April 4, 1974, ISLI commenced an action in Chicago, Illinois, against LOCAFRANCE and ATLAS. The amended verified complaint in that action (A216) asked that LOCAFRANCE be enjoined from selling the forklift trucks to ATLAS and from wrongfully and unlawfully misappropriating ISLI's customers.

The complaint in the Illinois action indicates that the lessor-lessee relationship between ISLI and LOCAFRANCE was put in issue and that the immediate item of controversy was the repossession by LOCAFRANCE of all of the forklift trucks leased to ISLI and their sale by LOCAFRANCE to ATLAS, in violation of ISLI's right of redemption and other statutory rights. Moreover, documentary evidence consisting of ATLAS' offer to purchase dated January 25, 1974, and LOCAFRANCE's acceptance dated January 29, 1974, (A226-228, A229) shows that LOCAFRANCE was not merely "investigating" ISLI's financial posture (A153-A154); LOCAFRANCE was in the process of wrongfully seizing ISLI's forklift trucks, including trucks in which LOCAFRANCE had no interest, intimidating and threatening ISLI's executives, personnel, and customers (A106), and depriving ISLI of its customer's list and clientele. (A216-A223).

Affidavits and documents submitted by the defendants show that

both prior to the Illinois action and during the pendency of the Illinois action, agents of LOCAFRANCE repeatedly stated that they believed ISLI had submitted false financial statements and other documentation containing false information. (A209; A105; A23) A memorandum of T.J. Byrnes, a former officer of ISLI, indicates that LOCAFRANCE had threatened to bring fraud actions against ISLI officers including DANIEL H. OVERMYER before the commencement of the Illinois litigation. (A106, bottom of page.)

After hearings were in process on the injunction application, there were negotiations between ISLI and LOCAFRANCE which finally culminated in the settlement agreement of June 18, 1974, a copy of which appears in the Appendix. (A26).

The settlement agreement provides that ISLI will cause its Illinois action to be dismissed with prejudice, that ISLI will relinquish its rights to all but 33 of the forklift trucks, and that ISLI will pay LOCAFRANCE the sum of $600,000.00 over a period of several years.

In return, LOCAFRANCE gave ISLI a general release extinguishing all prior claims arising from the three sale leaseback transactions. Moreover, LOCAFRANCE agreed that ISLI could retain 33 of the forklift trucks under a new lease. It was provided that ISLI could thereupon sublease these forklifts to individual warehouse corporations.

It is highly significant that the settlement agreement dictates the form of these subleases. (A35; A89;A210;A230). Thus, it is required by the settlement agreement that the subleases between ISLI

and the individual warehouse corporations provide for direct enforcement by LOCAFRANCE. A default by ISLI under the settlement agreement would constitute a default by the local warehouse corporation under the terms of its sublease, permitting LOCAFRANCE to take legal action directly against the sublessee.

Prior to the commencement of the present action in the District Court, LOCAFRANCE brought a series of actions against the local warehouse corporations, alleging that it was entitled to the total balances under the subleases because of the provisions of the settlement agreement. (A210-211; A237). Consequently, LOCAFRANCE has exercised rights under the settlement agreement against new parties, and in fact has entered judgment against at least two of the local warehouse corporations (A212).

Through the present action, LOCAFRANCE seeks to resurrect the old sale leaseback contracts of 1972 and 1973, to characterize these contracts as securities, and to impose liability upon a former director and his family, including some of tender years, for alleged misrepresentations in connection therewith. (A211-212; see alleged misstatements in 1972 and 1973 as alleged at A9-A10).

The court below held that these claims were extinguished by the release given by LOCAFRANCE pursuant to the settlement agreement of June, 1974 (A350-A353).

POINT I

THE SETTLEMENT AGREEMENT HAS SUPERSEDED AND REPLACED LOCAFRANCE'S PRIOR CLAIMS.

Blair & Co. v. Otto V. 5 A. D. 2d 276, 171 N.Y.S. 2d 203 (1st Dept., 1958) was mentioned by the defendants at oral argument. This case was cited in passing by a memorandum of the plaintiff (A171), but in fact supports the contentions of the defendants.

The plaintiff, Blair & Co., was in the business of financing and arranging for the financing of business promotions. The defendants, "the Otto group", were promoters of oil concessions in South America. Blair & Co. rendered services under a written contract, and claimed it was not paid.

To avoid litigation, the Otto group executed a second contract with Blair & Co. Significantly, the second contract differed from the first in that the obligor to Blair & Co. was changed from the Otto group to a corporation (VAIOPA), and the agreements as to commissions were changed and made to depend on certain contingencies. It is also noteworthy that the new contract provided that the Otto group no longer had any liability under the first contract.

When the new corporation, VAIOPA, did not perform, Blair & Co. brought suit against the Otto group, alleging that the new agreement was merely conditional, in which event a failure to perform by the new corporation, VAIOPA, would entitle Blair to sue on the first contract. The court held that the clear language of the new agreement

was to release the Otto group. Moreover, the fact that Blair received new and different benefits under the second contract indicated an intent that the first agreement was dead and that the second one was the one that henceforth was to govern.

The present controversy fits squarely within the facts of Blair. Here the parties intended that the settlement agreement replace and supersede the prior claims, including both LOCAFRANCE's claims under the 1972 and 1973 sale-leaseback contract and ISLI's claims as expressed in the Illinois action.

It cannot be denied that the settlement agreement herein differs from the 1972 and 1973 sale leaseback contracts in numerous respects. Insofar as the settlement agreement affects the rights of ATLAS and of the local warehouse corporations, the parties have been changed. In addition, the number of forklift trucks leased and the terms of the lease were altered. The settlement agreement provided LOCAFRANCE with remedies against the local warehouse corporations which LOCAFRANCE did not previously have.

In Blair, the new contract provided that the Otto group would no longer be liable under the first contract. In the present case, LOCAFRANCE gave ISLI a general release, completely exonerating it from liability in connection with the sale leaseback transactions. This release of ISLI from all liability is referred to in the complaint herein as a "modification". (A8,A24).

The undisputed facts in the present case indicate that LOCAFRANCE has brought actions against the local warehouse corporations

and has entered judgment in at least two of those actions (A210-211; A206). LOCAFRANCE took possession of the disputed 230 forklift trucks. The Illinois action commenced by ISLI was dismissed with prejudice.

In the present case, as in Blair, the clear language of the new agreement was to release the parties from claims based upon the old contracts, to settle their differences, and to readjust their legal rights and obligations. The undisputed fact that LOCAFRANCE has received different benefits and different rights with regard to the local warehouse corporations indicates an intent that the 1972 and 1973 sale leaseback contracts are dead and that the settlement now exclusively governs the rights of the parties. (A211-212). See also Moers v. Moers 229 N.Y. 294 (1920); Kromer v. Heim 75 N.Y. 574 (1879); Langlois v. Langlois 5 A.D. 2d 75,169 N.Y.S. 2d 170 (3d Dep., 1957); Lazere Financial Corp. v. Crystal Mart, Inc. 78 Misc. 2d 379, 357 N.Y.S. 2d 973 (N.Y. Civ. Ct., 1974).

By bringing a securities action founded on alleged misrepresentations relating solely to the 1972 and 1973 sale leaseback contracts (A9,A10), LOCAFRANCE ignores the fact that the old contracts have been superseded and replaced. Miller v. Jamaica Savings Bank 50 A.D. 2d 865,377 N.Y.S. 2d 89 (2d Dep., 1975). LOCAFRANCE invokes rights and remedies based upon both the settlement agreement and the old sale leaseback contracts. If LOCAFRANCE is entitled to such cumulative remedies, of what force and effect is the release? Of what purpose is the 1974 settlement?

In addition, no securities action can be founded upon the settlement agreement because no sale of securities occurred (A212). LOCAFRANCE neither advanced additional funds nor supplied additional equipment. Rather, all that LOCAFRANCE did was to settle the Illinois litigation wherein ISLI demanded that LOCAFRANCE return the repossessed forklift trucks and refrain from interfering with its customers (A212,A216).

Even assuming arguendo that the underlying sale-leaseback transactions might constitute the sale of a security, a point which defendants would deny, one notes that any sale that might have occurred took place with regard to the sale leaseback transactions of 1972 and 1973, and not with regard to the settlement agreement. Consequently, LOCAFRANCE should be restricted to its common law remedy for alleged breach of contract, and should not be entitled to bring the present lawsuit in a federal forum.

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING LOCAFRANCE'S INFORMAL APPLICATION FOR REARGUMENT.

Defendants' motion to dismiss came on to be heard on November 4, 1976. Both parties voluntarily stipulated to waive a written transcript of the proceedings. Counsel for plaintiff presented his side of the controversy, and counsel for the defendants presented his.

Five days later, when the decision was read into the record, plaintiff's attorney began to reargue the motion, rehashing the same stale arguments about a supposed "executory accord" that he had previously asserted in his memorandum in ooposition (A160), affidavits (A151,A205), surreply (A328), and oral argument on November 4, 1976. He now alleges on appeal that the fact that his untimely oration was not heard out to the bitter end constitutes reversible error.

On the contrary, it is a settled principle that the grant of leave to reargue is within the sole discretion of the District judge. DeWindt v. O'Leary 118 Fed. Supp. 915, 917 (S.D.N.Y. 1954). Moreover, an order denying reargument is not in itself an appealable order. Klein v. Spear, Leads & Kellogg 65 F.R.D. 406, 409, (S.D.N.Y. 1974).

Even if there had been no oral argument in the first instance, the mere absence of oral argument would not provide a ground for reversal. The applicable law on this question has been summarized by Professor James W. Moore, MOORE's FEDERAL PRACTICE, 2d Ed., Vol. 6 (1976) ¶56.14(1).

> While due process guaranteed under the Fifth Amendment does not include the right to oral argument on a motion, there is a division of authority as to whether a motion for summary judgment may be granted without affording oral argument. The Third, Seventh, Eighth and District of Columbia Circuits have held that oral argument may be dispensed with in appropriate circumstances. The Ninth Circuit, however, has read the language in Rule 56(i) referring to "the hearing"

> as invalidating a local rule that does not admit a request for oral argument. . . (quoting Dredge Corp. v. Penny (9th Cir., 1964) 138 F 2d 456.) . . And the Fifth Circuit has also held that oral argument is required. But, even when a party is entitled to oral argument, as a general proposition there will be circumstances when a court may properly terminate oral argument or even dispense with it; and the right can be waived.

Professor Moore makes no mention of Second Circuit decisions on this point. However, the rule in this circuit is well established that oral argument may be dispensed with when it does not deprive a party of any substantial rights. United States v. O'Connor 291 F. 2d 520 (2d Cir., 1961). Consequently, the Second Circuit follows the majority rule; and the cases cited by plaintiff, Dredge v. Penny and others, are not controlling.

In United States v. O'Connor 291 F.2d 520 (2d Cir., 1961), proceedings in the District Court were adjourned so as to provide further time for oral argument. In the interim, however, the District judge died. Nevertheless, the District judge had already made a decision based upon the prior oral argument and the briefs. The decision stated that "in the considered opinion of this Court, further argument and/or testimony is unnecessary. . ."

On appeal, the defendants alleged that they were deprived of a fair hearing and that, having granted further oral argument, the District judge was obliged to go through with it, since the defendants may have refrained from presenting relevant legal considerations in reliance on his promise. The Court of Appeals rejected this argument, noting that the defendants had presented their contentions

fully in their brief. It was within the power of the trial judge to deny oral argument. F.C.C. v. WJR 337 U.S. 265,69 S.Ct. 1097,93 L.Ed. 1353 (1949). While it would have been preferable had the District judge been able to hear further argument as promised, the procedure that was followed did not deprive the defendants of any substantial rights.

In the present case, plaintiff's attorney argued and reargued.

Even assuming, as plaintiff insists, that LOCAFRANCE had some hypothetical right to reiterate its views at a second oral argument to be held on November 9, 1976, the fact is that LOCAFRANCE waived that right. If LOCAFRANCE had anything further to say, the time to say it was when Judge Brieant announced that he was going to decide the motion and began to read his decision into the record (A347). LOCAFRANCE cannot keep silent, waiting to hear whether the decision is favorable or not, before objecting to the lack of additional oral argument. As the transcript indicates, Judge Brieant announced that he was going to decide the motion at (A347), but did not state that he is finding for the defendants until (A352).

LOCAFRANCE had the choice of either accepting the decision, favorable or not, without further oral argument, or objecting immediately. It would be inequitable to permit LOCAFRANCE to remain silent, encourage the District judge to proceed with the reading of his opinion, and then, only in the event that the decision is unfavorable, to raise vociferous objections about "prejudice", "parol evidence," "oral argument," "abuse of discretion."

Where were these objections when Judge Brieant began to speak?

As Professor Moore indicates, "even where a party is entitled to oral argument, as a general proposition there will be circumstances when a court may properly terminate oral argument or even dispense with it; and the right can be waived." MOORE'S FEDERAL PRACTICE, 2d Ed., vol. 6. (1976) ¶56.14(1). In the present case, the mere fact that plaintiff stipulated, at the proceedings of November 4, 1976, that no written transcript be made, operates as a waiver of his right to oral argument.

Moreover, LOCAFRANCE is quite unclear as to what, exactly, it hopes to achieve by such an oral argument. "In addition, by reason of the District Court's limitation upon oral argument, LOCAFRANCE was substantially prejudiced by being precluded from establishing, inter alia, that the release was fraudulently induced." (Plaintiff-Appellant's brief, p.10) LOCAFRANCE misconceives the purpose of oral argument, which is not to establish facts, but to present relevant legal authority and to make arguments fairly arising on the evidence.

LOCAFRANCE protests that it was denied the opportunity to submit parol evidence. If LOCAFRANCE were planning on submitting such parol evidence by means of an oral argument or reargument that was allegedly denied, LOCAFRANCE was greatly mistaken. Evidence cannot be given on oral argument. See Code of Professional Responsibility, DR 7-106 (c)(3).

Moreover, LOCAFRANCE seems to misunderstand the meaning of the term "parol evidence." Parol or extraneous evidence is "such as is not furnished by the document itself, but is derived from outside sources." BLACK'S LAW DICTIONARY, 4th Ed.(1968). The affidavits of DAVID RAIBLE (A21), PAUL W. SIEGE (A151), IRWIN M. ECHTMAN (A208) and JAN D. ATLAS (A205) are parol evidence.

In spite of this impressive array of parol evidence, LOCAFRANCE claims that the judgement should be reversed because the District court failed to consider parol evidence.

The fact is that the procedure that was adopted by the court below was fair in all respects. To be sure, the defendants' motion to dismiss was "exhaustive." However, the plaintiff's memorandum in opposition, at thirty one pages, could not be called cursory. Both parties knew that the motion to dismiss could be treated, at the court's discretion, as a motion for summary judgement, (A124), and both parties submitted affidavits. The plaintiff was given a fair opportunity to submit affidavits, documents, and memoranda. Even the surreply, which was submitted by plaintiff without leave to do so, was read and analyzed by the court. Consequently, no substantial rights of the plaintiff were prejudiced by the absence of further uninhibited reargument and there was no abuse of discretion by the District court in denying LOCAFRANCE's informal application for reargument.

POINT III

SINCE LOCAFRANCE DID NOT QUESTION THE EFFECTIVENESS OF THE RELEASE IN THE DISTRICT COURT, IT MAY NOT QUESTION ITS EFFECTIVENESS ON APPEAL.

It is puzzling to find the plaintiff-appellant claiming that "the meaning and construction of the release was not clearly placed in issue until the District Court determined the instant motion. . ." (Plaintiff-Appellant's brief, p. 14) Had the plaintiff consulted the motion of the defendants, it would have discovered that the second ground upon which defendants sought to dismiss the complaint reads as follows:

> 2. To dismiss the action because plaintiff's claims are barred by a release duly executed by plaintiff and accordingly the complaint fails to state a claim upon which relief can be granted. (A17).

Had the plaintiff read further, it would have found this issue to be raised squarely by the affidavit of DAVID RAIBLE.

> Pursuant to this settlement, Locafrance duly executed a release, a copy of which is attached hereto as Exhibit C, exonerating ISLI from all liability in connection with the sale leaseback transactions.
>
> This accord and satisfaction and full release of ISLI from all liability is referred to in the complaint at paragraph 14 and 15 as a "modification." (A23-A24).

Had the plaintiff read still further, it would have discovered the following passage "hidden away" in Point I of the defendants' memorandum on the first page thereof (A123).

> Moreover, it is settled under the law of Illinois that the release of one joint tortfeasor will

> operate as a release of all other joint tortfeasors unless the injured party has expressly reserved his right to sue. Sears, Suesy & Co. v. I.N.A. 396 Fed. Supp. 820 (DC ND Ill., 1975); Anderson v. Maetzke 131 Ill. App. 2d 61, 206 N.E. 2d 137 (1970); Putnam v. Continental Air Transp. Co. 297 F. 2d 501 (7th Cir., 1961); Wallner v. Chicago Consol. Traction Co. 245 Ill. 148, 91 N.E. 1053 (1910). Here, plaintiff did not reserve his rights to sue parties other than ISLI; and consequently plaintiff's suit is barred.

Assuming that the plaintiff did in fact have any questions regarding the "meaning and construction of the release" (Plaintiff-appellant's brief, p. 14), it was incumbent upon him to bring these questions to the attention of the court below.

Plaintiff's affidavits do not say the release was ambiguous on its face; do not offer an explanation of the release's intended interpretation; do not offer any evidence whatever of fraud in the inducement to settle the Illinois action; do not contradict defendants' hard evidence that plaintiff here raised the issue of fraud in the Illinois action prior to settling it; and do not say the release was contingent upon performance of the settlement agreement. Any arguments re the foregoing now made by plaintiff's counsel are wholly without support in the record.

Now on appeal, for the first time, plaintiff argues that the release is ambiguous; (Plaintiff-appellant's brief, pp. 23-26); that it was error for the court below to "refuse" to consider parol evidence that plaintiff never even offered (Plaintiff-appellant's brief pp. 23-25); that the release raises unspecified issues of fact (Plaintiff-appellant's brief, p. 15); that the release never

became effective (Plaintiff-appellant's brief, p. 21); that the release is dependent upon certain conditions precedent (Plaintiff-appellant's brief, pp. 11, 22, 26, 27); and finally, that it can simply rewrite the terms of the release by inserting new words, which new words the plaintiff then underlines as showing the true meaning of the release, viz. what the plaintiff now wishes that the release had said (Plaintiff-appellant's brief, p. 21: "becoming effective in accordance with [performance of] its terms").

Even if plaintiff's new arguments had merit, which they do not, they do not appear in the record below and plaintiff cannot raise them for the first time on appeal. Plaintiff cannot pick and choose which theories to present and which to reserve for later use. The courts have frequently observed that "a claimant ordinarily cannot expect to lose in the trial court on one theory but win on appeal under another." Browzin v. Catholic University of America 527 F. 2d 843 (D.C.Cir., 1975).

"[T]he purpose of the rule requiring objections is to prevent reversals and consequent new trials because of errors the judge might well have corrected if the point had been brought to his attention." Steinhauser v. Hertz Corporation 421 F. 2d 1169 (2d Cir., 1970). Accordingly, litigants must make known to the court below the action sought and the reasons therefor. "An appellate court will not . . . permit a party to allege on appeal what it failed to claim to the trial court." Fortunato v. Ford Motor Co. 464 F. 2d 962 (2d Cir., 1972). See also United States v. Donelly 397 U.S.

286, 295,90 S.Ct. 1033, 25 L.Ed. 2d 312, 319 (1970); Wilkerson v. Meskill 501 F. 2d 297 (2d Cir., 1974); Schwartz v. S.S. Nassau 345 F.2d 465 (2d Cir., 1965) cert. den. 382 U.S. 910.

Having had an ample opportunity to present its arguments regarding the release, and having voluntarily chosen not to place them in the record below, plaintiff is precluded from inventing new arguments on appeal.

POINT IV

LOCAFRANCE'S ALLEGATION THAT THE RELEASE WAS FRAUDULENTLY INDUCED IS REFUTED BY THE UNDISPUTED FACTUAL BACKGROUND AND BY DOCUMENTARY EVIDENCE.

In the District court, while MR. SIEGE did assert by way of mere conjecture his "belief" that the settlement agreement was an effort to divert LOCAFRANCE from the fraud (A155), LOCAFRANCE never set forth an iota of evidence that the release or settlement agreement was fraudulently induced. To avoid summary judgment, "a plaintiff must do more than whet the curiosity of the court: he must support vague accusation and surmise with concrete particulars." Applegate v. Top Associates, Inc. 425 F.2d 92 (2d Cir., 1970). LOCAFRANCE sets forth none.

It would be hard to imagine how LOCAFRANCE'S allegations of fraudulent inducement could be any vaguer than they are. The only fraudulent statements that LOCAFRANCE has ever alleged took place before the old sale leaseback contracts in 1972 and 1973. See

complaint herein ¶ 19(A8-A10). LOCAFRANCE asserts that defendant ISLI defaulted on the sale leaseback contracts in December, 1973, and that thereafter LOCAFRANCE "commenced investigations" (A153), "started to become aware" (A153), and "began making drastic inquiries" (A156), a process, one would conclude, that is still going on and will continue indefinitely into the future.

As the memorandum of T.J. BYRNES (A105) indicates, LOCAFRANCE had decided, as early as March, 1974, "to pull out all of the stops against I.S.L.I. and Overmyer" (A106). Moreover, representatives of LOCAFRANCE stated that they "intended to take legal action, probably in some sort of a fraud charge against Mr. Daniel Overmyer . . . and any Overmyer Officers or I.S.L.I. officers who had signed representation letters in the past, which they now felt there was ample evidence to prove had been fraudulent (sic), in that these officers knew or should have known that the financial condition of the various companies was in jeopardy and signed documents to the contrary." (A106)

Plaintiff does not deny the fact that it physically seized and repossessed approximately 230 forklift trucks. Plaintiff does not deny the meeting described in the memorandum of T.J. BYRNES in which LOCAFRANCE threatened "to pull out all of the stops against I.S.L.I. and Overmyer" (A106). Nor does plaintiff deny the fact that, during the pendency of the Illinois action, representatives of LOCAFRANCE including PAUL W. SIEGE repeatedly stated "that they believed ISLI had submitted false financial statements and other

documentation which contained false information" (A209). At the time of the Chicago litigation, how could there be reliance by LOCAFRANCE upon representations of ISLI? If LOCAFRANCE were relying on ISLI, it would not have seized the forklift trucks.

The negotiations that were carried out to settle the Illinois action were conducted by counsel on behalf of intelligent, sophisticated businessmen. Hence the settlement agreement and release that resulted from those negotiations cannot be attacked as easily as if the plaintiff were a doddering testator "on the brink," so to speak.

Plaintiff cites In Re Reif's Will 30 N.Y.S. 2d 47 (West. Surr. Ct., 1941) to show that parol evidence should have been considered in construing the release. In the case cited, to be sure, parol evidence was admitted to vary the terms of a purported assignment. However, the facts indicate that the transaction reeked of oppression, overreaching, and loan sharking. It appeared that the assignee had assigned rights to a $5,000.00 interest in a testamentary trust for a mere $615. The court said, "there can be no doubt that the written instruments which he concedely executed constitute an absolute transfer and sale. The question arises, however, as to whether or not they were a cloak or blind to cover a usurious and illegal transaction."

Similarly, in Adams v. Judson 243 App. Div. 404, 277 N.Y.S. 304 (1st Dep., 1935), parol evidence was needed by the court in order to learn the truth about a suspicious transaction. The facts demonstrated that certain payments had been made by the defendant through

a corporation owned by him. Plaintiff alleged that these payments were based on the defendant's liability; but the defendant would not state the reason for the payments. Moreover, the release in Adams v. Judson consisted of a paragraph in an agreement, and the record before the court did not contain the entire agreement. Consequently, several questions of fact remained unresolved.

The release in the present case, unlike the documents construed in In Re Reif's Will and in Adams v. Judson, is complete and unambiguous on its face. It is "a traditional form general release . . . the so-called Blumberg Form of General Release. It is a paper with which all lawyers are familiar." (A350).

Before parol evidence can be introduced to explain an ambiguity, it must appear that there is such an ambiguity as requires explanation. It is axiomatic that parol evidence cannot be used to create an ambiguity where none in fact exists.

In any event, even if parol evidence would be admissible to supplement or explain the provisions of the release, the fact is that the plaintiff did not present any parol evidence. F.R.C.P. 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The record is devoid of any factual support for LOCAFRANCE'S allegation of fraudulent inducement. Moreover, the circumstances

under which the release and settlement agreement came into being are such as to indicate the parties knew what they were doing, where well-advised as to the law, and meant exactly what they said.

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee's Notes on the 1963 Amendments to F.R.C.P. 56(e). The plaintiff has not presented any specific facts to contradict the affidavits of DAVID RAIBLE and IRWIN M. ECHTMAN; the release; the settlement agreement; the memorandum of T.J. BYRNES; the amended verified complaint in the Illinois litigation; the offer and acceptance between ATLAS and LOCAFRANCE; and the complaints of LOCAFRANCE against the local warehouse corporations. Accordingly, there is no genuine issue for trial and summary judgment is appropriate. First National Bank v. Cities Service Co. 391 U.S. 253, 88 S.Ct. 1575, 20 L. Ed. 2d 569 (1968); Applegate v. Top Associates, Inc. 425 F.2d 92 (2d Cir., 1970); Cowen v. New York Stock Exchange 371 F.2d 661 (2d Cir., 1967); Wojcinski v. Foley 226 Fed. Supp. 157 (D.C.,N.D.,N.Y., 1963) aff. 323 F.2d 665.

POINT V

THE DISTRICT COURT DID NOT ERR IN DISMISSING THE COMPLAINT AS TO ALL DEFENDANTS.

The defendants maintain that the release given by LOCAFRANCE should be interpreted in accordance with the law of Illinois, since

Illinois is the state having the most intimate contacts with the release. The sale of the repossessed forklift trucks was to occur in Illinois; plaintiff ISLI chose Illinois as the forum for its claims against LOCAFRANCE as well as against ATLAS; LOCAFRANCE appeared in Illinois and defended the action; a settlement agreement was reached, in accordance with which the Illinois litigation was discontinued; and Illinois thus served as the focal point for the controversy and the resulting settlement.

If the release is interpreted under Illinois law, the fact that a release was given to ISLI operates to release all of the defendants herein. Under Illinois law, the release of one joint tortfeasor releases all other joint tortfeasors unless the injured party has expressly reserved his right to sue. Sears, Sucsy & Co. v. I.N.A. 396 Fed. Supp. 820 (D.C., N.D., Ill., 1975); Anderson v. Martzke 131 Ill, App. 2d 61, 206 N.E. 2d 137 (1970); Putnam v. Continental Air Transp. Co. 297 F.2d 501 (7th Cir., 1961); Wallner v. Chicago Consol. Traction Co. 245 Ill. 148, 91 N.E. 1053 (1910).

Even assuming that Illinois law does not apply, one notes that the strong policy of the law against double recovery will bar the present action. When the settlement agreement was reached, ISLI gave up its chose in action in Illinois, its rights under the old sale leaseback contracts, and its rights to the 230 repossessed forklift trucks. ISLI further agreed to pay the sum of $600,000, with payments to be made over a number of years. In return, LOCAFRANCE gave up its rights under the old sale leaseback contracts, and

agreed that ISLI could retain possession of 30 of the forklift trucks (A26 et seq.).

Since it is common experience that, in a voluntary exchange, parties will give equals for equals, it must be presumed in the absence of contrary evidence that the rights that ISLI surrendered and the rights that LOCAFRANCE surrendered are of equal value. In the court below, LOCAFRANCE offered no evidence to show that its claims on the old sale leaseback contracts were not completely satisfied by the settlement agreement. Indeed, it should be noted that LOCAFRANCE only alleged $723,000 in damages in the present action (A16). LOCAFRANCE further conceded that it loaned no more than $1,000,000 in toto to ISLI, and claimed that $723,000 remained unpaid. When the alleged damages of LOCAFRANCE are compared with the $600,000 in payments that ISLI agreed to make as part of the settlement, the claims in the Illinois action that ISLI relinquished, and the 230 valuable forklift trucks, where 276 of the trucks were deemed to be worth $1,000,000 in the 1972 and 1973 sale leaseback agreements, it is apparent that the settlement agreement was intended to operate and did operate as a full satisfaction of all of LOCAFRANCE'S claims based on the old sale leaseback contracts.

LOCAFRANCE failed to disclose at the time of the settlement that it intended to reserve rights against the individual defendants. The general release was part and parcel of an overall settlement of the entire claims of both parties. It was given in the context of litigation instituted by ISLI which may likely have resulted in a

decision favorable to ISLI. That litigation was discontinued with prejudice. Accordingly, LOCAFRANCE is estopped as a matter of law from contending now that the settlement was only a partial settlement of its claims.

It is a fundamental principle of law that a plaintiff cannot receive a double recovery. Berlow v. New York State Thruway Authority 29 N.Y.2d 949, 329 N.Y.S.2d 579 (1972); Malvica v. Blumenfeld 28 N.Y.2d 851, 322 N.Y.S.2d 249 (1971); Metropolitan Dry Cleaning Machinery v. Hirsch 38 A.D. 2d 558, 328 N.Y.S.2d 349 (2d Dep., 1971); Ruge v. Arden Hill Hospital 83 Misc. 2d 109, 371 N.Y.S. 2d 354 (Orange Cty. Sup., 1975). Even if a release given to ISLI does not necessarily release the other defendants herein, the release of ISLI raises a presumption that LOCAFRANCE'S claim has been satisfied.

Had LOCAFRANCE desired to establish that the value of the rights received from ISLI was less than the value of LOCAFRANCE'S claim, the burden was on LOCAFRANCE to do so. In the court below, LOCAFRANCE made no showing whatever that the settlement agreement was not meant as a full satisfaction of all of LOCAFRANCE'S claims. It would have been impossible, in any event, for LOCAFRANCE to successfully maintain this position, because the settlement agreement by its own terms includes cash payments nearly equalling LOCAFRANCE'S claims, with 230 forklift trucks of great value (LOCAFRANCE itself paid $1,000,000 for 276 of them), and a substantial claim for damages in the Illinois litigation (A26 et seq.).

When LOCAFRANCE'S present claim is viewed in the light of

general principles governing damages under the federal securities laws, one finds that LOCAFRANCE is barred from recovery by the settlement and release. It is axiomatic that a plaintiff in a securities action can obtain either out of pocket damages or rescission; he cannot obtain both. See Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L. Ed. 2d 741 (1972) reh. den. 408 U.S. 931; Gordon v. Burr 506 F.2d 1080 (2d Cir., 1974); Chasins v. Smith, Barney & Co. 438 F.2d 1167 (2d Cir. 1970). Hence LOCAFRANCE is required to elect between out of pocket damages and rescission.

In settling their disputes, LOCAFRANCE and ISLI rescinded the 1972 and 1973 sale leaseback contracts. These contracts have therefore been voluntarily annulled and cancelled. "Once made, a settlement agreement terminates the litigation and a new superseding agreement arises which is the measure of each party's obligation to the other." Owens v. Lombardi 51 A.D. 2d 438, 343 N.Y.S. 2d 978 (4th Dep., 1973).

Accordingly, LOCAFRANCE has already received the remedy of rescission. Its prior claims have been replaced by its rights under the new settlement agreement, which henceforth must govern the rights of the parties. LOCAFRANCE cannot now assert any claims that arise out of the old 1972 and 1973 transactions, whether the claims be based upon contract, the securities laws, negligence, or fraud. Miller v. Jamaica Savings Bank 50 A.D. 2d 865, 377 N.Y.S. 2d 89 (2d Dep., 1975).

An accord and satisfaction has been reached between the parties. The satisfaction which LOCAFRANCE received is that its prior claims were exchanged for new and different rights embodied in the settlement agreement, and the prior claims were extinguished.

Since LOCAFRANCE has already rescinded the old sale leaseback contracts with ISLI, LOCAFRANCE is barred from seeking the remedy of rescission. Similarly, LOCAFRANCE cannot receive out of pocket damages, because this would entitle LOCAFRANCE to a double recovery.

POINT VI

THE VALIDITY OF THE SETTLEMENT AND RELEASE IS NOT AFFECTED BY §29 OF THE SECURITIES AND EXCHANGE ACT.

In order to support its contention that the release could not operate as a bar to the federal claims by reason of §29 of the Securities and Exchange Act (15 U.S.C. §78cc), plaintiff cites Cohen v. Tenney Corporation 318 Fed. Supp. 280 (S.D., N.Y., 1970) (A39-40). Plaintiff neglects to inform the court that this case was later modified on reargument on the precise point that plaintiff seeks to support.

Section 29 provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

Every case that has squarely considered the question has held

that this provision was designed to prohibit exculpatory clauses in brokerage contracts and by no means makes it impossible to settle controversies involving alleged violations of the securities laws (A313). As Judge Conner stated in Korn v. Franchard Corporation 388 Fed. Supp. 1326 (D.C., S.D,, N.Y., 1975);

> Section 29(a) and its counterparts, which can be found in all six federal securities acts, prevent professional broker-dealers from circumventing the provisions of those acts by invalidating any attempt to obtain anticipatory waivers of compliance with the provisions of the Securities Exchange Act of 1934, Wilko v. Swan 346 U.S. 427 (1953); Junker v. Midterra Assn. Inc. 49 F.R.D. 310, 313 (1970), and should not be construed to apply to the release of matured claims. To rule otherwise would foreclose the parties from settling matured claims and force every claimant to pursue the litigation to its costly conclusion. Many small but otherwise settleable cases would have to be dropped and many large but otherwise settleable cases would clog the dockets of the federal courts. This would not only constitute a blow to judicial economy, but to justice and common sense as well. See Mittendorf v. J.R. Williston & Beane 372 Fed. Supp. 821, 835 (S.D., N.Y., 1974). The cases relied upon in In re Cohen's Will, supra, [51 F.R.D. 167 (S.D., N.Y., 1970) cited in plaintiff's brief at p. 29] do not rule to the contrary but, to the extent to which they are relevant here, support this position.

Judge Conner further relates the fact that Judge Tenney changed his position on the reargument of Cohen v. Tenney Corp. 318 Fed. Supp. 230 (S.D., N.Y., 1970) and repudiated the view that is now advanced by plaintiff.

The settlement and release herein were executed in June, 1974, in order to settle claims that had matured in 1972 and 1973 with regard to the old sale leaseback transactions. Consequently, the

validity of the settlement and release is not affected by §29 of the Securities and Exchange Act.

POINT VII

THE DISTRICT COURT DID NOT ERR AS A MATTER OF LAW IN ITS CONSTRUCTION OF THE RELEASE.

Even assuming arguendo that plaintiff's arguments regarding the construction of the release are properly before the court, it can be readily shown that the arguments lack merit.

By reading into the release language which is not there in the first place (plaintiff's brief, p. 21), plaintiff concludes that the release is dependent upon performance of the settlement agreement. However, the release does not say that. As Judge Brieant aptly noted, "The release contains a provision to the effect that it is dependant (sic) upon an agreement dated the same date becoming effective in accordance with its terms. It does not state that the effectiveness of the release is conditioned upon performance of that agreement, but expressly says merely upon it becoming effective in accordance with its terms." (A351-352). Plaintiff then argues that the typewritten language in the release could not have meant it would become effective when the settlement agreement was signed, because both documents were executed contemporaneously. The typewritten language in the release would therefore have been superfluous.

Here, plaintiff is grossly mistaken. Paragraph 25 of the

settlement agreement (A43) provides it is not effective until ATLAS agrees to be bound by certain clauses in the agreement, and that if ATLAS does not sign by June 28, 1974, the releases are to be null and void. This was the condition to be fulfilled to make the release and the settlement agreement effective. Obviously this condition was fulfilled, else LOCAFRANCE could not have brought suit and obtained judgment against sublessees of the trucks. The potential right of action against sublessees was created by the settlement agreement.

The language of the release excluding the settlement agreement and new subleases from its operation was clearly designed to preserve for LOCAFRANCE rights of action if the settlement agreement was breached, and nothing else. That very exclusionary language is another clear indication that LOCAFRANCE was wiping the slate clean and forgiving ISLI all prior causes of action. Any intimation by plaintiff to the contrary, unless supported by hard evidence to the contrary, should be treated as sham. The record here is devoid of any such evidence to support plaintiff's newly adopted view.

None of the cases cited by LOCAFRANCE for the first time on appeal to show that the release presents questions of fact are applicable to the present case. In Dury v. Dunadee 383 N.Y.S. 2d 748 (1 Dep., 1976), the court expressly states that the "releases which arise out of personal injury accidents. . . are subject to highly specialized rules of interpretation." It is well-known

that releases in personal injury cases are too frequently obtained through overreaching, unfair dealing, or fraud in the factum; and courts are suspicious of releases in these situations. Fournier v. Canadian Pacific Railroad 512 F.2d 317 (2d Cir., 1975), cited by plaintiff, is a good example. Fournier was a personal injury case by a railroad employee. Despite the existence of a general release, an issue of fact was found since the plaintiff claimed that he was told, before signing the release, that it applied only to a claim for back wages. Hence Fournier holds that an allegation of fraud in the factum would under the circumstances establish an issue of fact. No such claim has been made here.

In addition, the releases at issue in Dury v. Dunadee 383 N.Y.S. 2d 748 (1 Dpe., 1976) and in Gordon v. Vincent Youmans, Inc. 358 F. 2d 261 (2d Cir., 1965) were ambiguous in several respects. The transactions in Gordon occurred 35 years before the cause was tried. During this period, all of the parties to the transaction had died and one of the crucial assignments had been lost, leaving only some highly ambiguous evidence. The release in the present case is not ambiguous and therefore these decisions do not apply.

Point II of plaintiff-appellant's brief is entitled, "The District Court Erred As A Matter of Law In Its Construction of The Release." However, a reading of this point discloses absolutely no cases, statutes, or arguments in support of the plaintiff's thesis. The entire point consists of a narrative summary of the District

Court's holding. In essence, this is an admission by the plaintiff that it could find no support, whether in case law, statutory law, or reason, for the assertion that "The District Court Erred As A Matter Of Law In Its Construction Of The Release."

POINT VIII

LOCAFRANCE'S OWN CONTENTIONS REGARDING AN ALLEGED LIQUIDATED DAMAGES AGREEMENT PROVE THAT THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

In the court below, plaintiff characterized the settlement agreement as a "liquidated damages agreement." (A154, A161, A162, A171, A186, A187, A189). The defendants objected to this catachresis (A307 et seq.) but noted that the mere breach of a liquidated damages agreement will not operate to revive the plaintiff's unliquidated claim. (A310 et seq.).

As In re Rosenberg's Estate 36 Misc. 2d 439, 233 N.Y.S. 2d 39 (N.Y. Surr., 1962) observes, "it has long been established that 'when the parties by their contract provide for the consequences of a breach of contract, lay down a rule to admeasure the damages, and agree when they are to be paid, the remedy thus provided must be exclusively followed. [citations omitted'" (Emphasis added). See also Frankell Carpet Fashions, Inc. v. Abraham 228 N.Y.S. 2d 123 (Nassau Co. Ct., 1962); New York Dock v. City of New York 246 App. Div. 620, 283 N.Y.S. 2 (2d Dep., 1935).

To escape the rule of these cases that a liquidated damages

agreement must be exclusively followed, plaintiff dropped his use of this term, began to equivocate, and stated "what it may be called . . . is wholly irrelevant." (A206. Note that the affidavit of JAN ATLAS was actually submitted in surreply, as shown in defendants' statement of the case, and should appear at A328. See also A328 et seq.)

Plaintiff may not change its position so readily, for the doctrine of judicial estoppel precludes it from playing "fast and loose" with the court during the course of litigation. See W. Beck, Estoppel Against Inconsistent Positions in Judicial Proceedings, 9 Brooklyn L. Rev. 245 (1940). Having represented to the court that the agreement was a liquidated damages agreement, plaintiff is bound by that representation and must accept the legal consequences flowing therefrom. Haughton v. Thomas, 220 App. Div. 415, 221 N.Y.S. 630 (1st Dept. 1927) aff. 248 N.Y. 523. See also Martin v. C A Productions Company 8 N.Y. 2d 226, 203 N.Y.S. 2d 845 (1960); Assets Realization v. Roth 226 N.Y. 370, 123 N.E. 743 (1919); Sengstack v. Sengstack 7 Misc. 2d 1012, 166 N.Y.S. 2d 576 (N.Y. Sup., 1957) aff. 4 N.Y. 2d 502, 176 N.Y.S. 2d 337; Feuer v. Feuer 8 A.D. 2d 805 , 187 N.Y.S. 2d 933 (1st Dep,, 1959); In re Tuduri's Estate 56 Misc. 317, 281 N.Y.S. 630 (Surr. N.Y. 1935).

If, as LOCAFRANCE contends, the settlement agreement of June, 1974, were actually a "liquidated damages agreement," then any alleged breaches of the liquidated damages agreement would not operate to revive LOCAFRANCE'S prior claim. Rather, LOCAFRANCE would be

restricted to the liquidated damages agreement as an exclusive remedy.

POINT IX

DISMISSAL IS MANDATED FOR SEVERAL REASONS OTHER THAN THE RELEASE.

The District Court specifically did not reach any issues other than the release (A352-A353), in part because it considered bringing of the lawsuit in the face of the release "just plainly and simply frivolous" (A353).

Dismissal would also have been mandated on other grounds raised below, which will not be treated in depth here, since they were briefed below and since defendants' brief below is reproduced in the appendix.

Other grounds for dismissal are:

1. The action is barred by an accord and satisfaction (argued at A123-A124 and A307-A311. See also Blair & Co. v. Otto, V. 5 A.D. 2d 276, 171 N.Y.S. 2d 203 (1st Dep., 1958).

2. Certain causes of action are barred by the statute of limitations argued at(A125-A129 and A323-A325).

3. Defendants JOHN OVERMYER, ELIZABETH OVERMYER and EDWARD OVERMYER are not controlling persons (argued at A315-A316).

4. A "JOHN DOE" complaint should not be permitted (argued at A133-A135 and A317-A320).

5. The complaint fails to allege use of mails or instrumentalities of interstate commerce (argued at A130-A132 and A321-A322).

6. The complaint fails to comply with F.R.C.P. 9(b) (argued at 140-A141).

7. Plaintiff's claim is barred by laches (argued at A142-A143).

8. Pendent jurisdiction should not be exercised over the fourth, fifth and sixth causes of action (argued at A144-A145).

9. If the action is to be maintained, plaintiff should be required to post security for costs (argued at A146-A149 and A326-A327).

CONCLUSION

By reason of the foregoing, it is respectfully requested that the Judgment entered in the District Court be affirmed.

Respectfully submitted,

Easton & Echtman, P.C.
Attorneys for Defendants
Appellees Intermodal Systems
Leasing, Inc., Daniel H.
Overmyer, Shirley Overmyer,
John Overmyer, Elizabeth
Overmyer, and Edward Overmyer.

Of Counsel:

Irwin M. Echtman

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Kenneth Edward Kennedy, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 171 Sterling Pl B'klyn N.Y. 11213.

That on the 14 day of MARCH, 1977, deponent personally served the within BRIEF FOR DEFENDANTS-APPELLEES upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

REGAN, GOLDFARB HELLER WETZLER & QUINN
ATTORNEYS FOR PLAINTIFF-APPELLANT
445 PARK AVE.
NEW YORK, N.Y. 10022

Kenneth E. Kennedy

Sworn to before me this
14 day of March, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978